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Savatery a/p Jayaraman v Teoh Ying Rin

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HIGH COURT (SHAH ALAM) — CIVIL SUIT NO BA-22NCVC-167-06
OF 2020
FAIZAH JAMALUDIN J
29 SEPTEMBER 2023

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Succession — Probate — Validity of will — Plaintiff challenged validity of late husband's will propounded by defendant — Whether there were circumstances attending to preparation and execution of will that gave rise to suspicion on basis of which court should not allow will to be probated — Whether testator was subjected to undue influence in signing and making will — Whether plaintiff was entitled to declaratory reliefs sought

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The plaintiff filed this action challenging the validity of the will dated 29 April 2019 ('2019 will') executed by her late husband ('the testator'). She sought a declaration that: (a) the 2019 will was null, void and of no effect and that it be set aside; and (b) the testator had died intestate. The defendant was the propounder, executor and trustee of the 2019 will. The plaintiff only found out about the 2019 will when, after the testator's funeral, the defendant came to the plaintiff's house and showed her the 2019 will together with two letters. The defendant on the other hand, knew of the will and its contents prior to the testator's death as she was the one who had typed and prepared the will. She was bequeathed by the testator a substantial amount of his property and the residue of his estate. The defendant testified that she had also prepared and typed the testator's first will in 2017 ('the 2017 will') and his second will in 2018 ('the 2018 will'). The plaintiff was the testator's lawful widow and at the time of his death, they had been married approximately 36 years. There were no children in the marriage. The testator had joined a company named Asia Fertiliser Manufacturer Sdn Bhd ('Asia Fertiliser') and subsequently became a shareholder of Asia Fertiliser. He also incorporated another company, Advanced Fertilizer Manufacturer Sdn Bhd ('Advanced Fertilizer'). The defendant did some accounts work for Asia Fertiliser on an ad-hoc basis. When the testator incorporated Advanced Fertilizer, the defendant joined the company as a full-time staff. Within five years of joining Advanced Fertilizer, the defendant climbed up the ranks of the company from accounts officer to director. Approximately a month before the testator's death, the defendant was appointed a director of Asia Fertiliser. And just before his death, the testator transferred 20,000 of his shares in Asia Fertiliser to the defendant and sold her 1,250,000 shares of his shares in Advanced Fertilizer. The testator bequeathed the defendant in the 2019 will: (i) his share of the land and the factory building; (ii) 1,500,000 shares in Advanced Fertilizer; (iii) 60% of his monies standing to

the creditor of his accounts including fixed deposit accounts; and (iv) the residue of his estate, which consisted of jewellery and religious books. With the gift of the testator's shares in Advanced Fertilizer in the 2019 will, the defendant became the majority shareholder of the company. The plaintiff challenged the validity of the 2019 will on the grounds that the testator lacked testamentary capacity and suspicious circumstances surrounding the preparation and execution of the 2019 will. She also alleged that the defendant had exerted undue influence on the testator in the preparation and execution of the 2019 will. The issues for determination were: (1) whether there were circumstances attending to the preparation and execution of the will that gave rise to suspicion on the basis of which this court should not allow the will to be probated; (2) whether the testator was subjected to undue influence in signing and making the will; and (3) whether the plaintiff was entitled to the declaratory reliefs sought in this action.

Held, allowing the application:

- (1) The defendant had played a prominent part in the preparation and execution of the 2019 will. Suspicious circumstances existed by reason of the fact that the defendant had prepared the 2019 will and was a beneficiary of a substantial amount of the testator's property under the will. Next, the defendant did not plead the existence of the 2017 will and the 2018 will in her defence. She only informed the plaintiff of the existence of the 2018 will in her reply to the plaintiff's application for further and better particulars. And she only mentioned the existence of the 2017 will during the trial. The defendant did not produce any evidence to dispel or remove the suspicious circumstances surrounding the preparation and execution of the 2019 will. It was impossible for the court to determine which of the defendant's evidence as to how she prepared the 2019 will was true since she did not produce the 2018 will in court or the paper on which she claimed the testator had written his instructions to increase the percentage of shares in the company he was bequeathing to her in the 2019 will. Until and unless the court was judicially satisfied that the evidence presented by the defendant had removed the suspicious circumstances, it ought not to allow the 2019 will to be probated. As the defendant failed to produce any evidence to dispel or remove the suspicious circumstances, the defendant had failed to discharge her burden of proof that the 2019 will was the last will and testament of the testator (see paras 97, 99, 102–103 & 105–107).
- (2) As the defendant had failed to dispel or remove the suspicious circumstances surrounding the preparation and execution of the 2019 will, the burden of proof did not shift to the plaintiff to prove that the testator was subject to undue influence in making and signing the 2019 will. Therefore, the court did not have to make a finding on whether or

- A not the testator was subjected to undue influence during the preparation and execution of the 2019 will (see paras 109–110).
- (3) Because of the defendant's failure to dispel or remove the suspicious circumstances surrounding the preparation and execution of the 2019 will to the satisfaction of the court's judicial conscience, the defendant
- B failed to prove that the 2019 will was indeed the testator's last will and testament and that it represented his wishes. Accordingly, it would be unsafe for the court to make a finding that the 2019 will was the last will and testament of the testator. The 2019 will was null and void and of no effect, and thus, should not be probated (see paras 111–112).
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[Bahasa Malaysia summary]

- Plaintif memfailkan tindakan ini mencabar kesahihan wasiat bertarikh 29 April 2019 ('wasiat 2019') yang dilaksanakan oleh mendiang suaminya ('pewasiat'). Dia memohon pengisytiharan bahawa: (a) wasiat 2019 adalah
- D terbatal, tidak sah dan tidak berkuat kuasa dan ia diketepikan; dan (b) pewasiat telah meninggal dunia tanpa wasiat. Defendan adalah pencetus, pelaksana dan pemegang amanah wasiat 2019. Plaintif hanya mengetahui tentang wasiat 2019 apabila, selepas pengebumian pewasiat, defendan datang ke rumah
- E plaintif dan menunjukkan kepadanya wasiat 2019 bersama dua surat. Defendan sebaliknya, mengetahui wasiat dan kandungannya sebelum kematian pewasiat kerana dialah yang menaip dan menyediakan wasiat tersebut. Dia telah diwasiatkan oleh pewasiat sejumlah besar hartanya dan baki harta pusakanya. Defendan memberi keterangan bahawa dia juga telah
- F menyediakan dan menaip wasiat pertama pewasiat pada 2017 ('wasiat 2017') dan wasiat keduanya pada 2018 ('wasiat 2018'). Plaintif adalah balu sah pewasiat dan pada masa kematiannya, mereka telah berkahwin kira-kira 36 tahun. Tidak ada anak dalam perkahwinan itu. Pewasiat telah menyertai sebuah syarikat bernama Asia Fertiliser Manufacturer Sdn Bhd ('Asia
- G Fertiliser') dan seterusnya menjadi pemegang saham Asia Fertiliser. Dia juga memperbadankan sebuah lagi syarikat, Advanced Fertilizer Manufacturer Sdn Bhd ('Advanced Fertilizer'). Defendan melakukan beberapa kerja akaun untuk Asia Fertiliser secara ad-hoc. Apabila pewasiat memperbadankan Advanced Fertilizer, defendan menyertai syarikat itu sebagai kakitangan sepenuh masa.
- H Dalam tempoh lima tahun selepas menyertai Advanced Fertilizer, defendan telah naik pangkat daripada pegawai akaun kepada pengarah. Kira-kira sebulan sebelum kematian pewasiat, defendan telah dilantik sebagai pengarah Asia Fertiliser. Dan sejurus sebelum kematiannya, pewasiat memindahkan 20,000 sahamnya di Asia Fertiliser kepada defendan dan menjual 1,250,000 sahamnya
- I dalam Advanced Fertilizer. Pewasiat mewasiatkan defendan dalam wasiat 2019: (i) bahagian tanah dan bangunan kilangnya; (ii) 1,500,000 saham dalam Advanced Fertilizer; (iii) 60% daripada wangnya wujud kepada pemiutang akaunnya termasuk akaun simpanan tetap; dan (iv) baki harta pusakanya, yang terdiri daripada barang kemas dan buku agama. Dengan pemberian saham

pewasiat dalam Advanced Fertilizer dalam wasiat 2019, defendan menjadi pemegang saham majoriti syarikat. Plaintiff mencabar kesahihan wasiat 2019 atas alasan pewasiat tidak mempunyai kapasiti berwasiat dan keadaan yang mencurigakan sekitar penyediaan dan pelaksanaan wasiat 2019. Dia juga mendakwa defendan telah memberikan pengaruh tidak wajar terhadap pewasiat dalam penyediaan dan pelaksanaan wasiat 2019. Isu-isu untuk penentuan adalah: (1) sama ada terdapat keadaan-keadaan yang berkaitan dengan penyediaan dan pelaksanaan wasiat itu yang menimbulkan syak wasangka yang berdasarkannya mahkamah ini tidak seharusnya membenarkan wasiat itu diprobetkan; (2) sama ada pewasiat telah tertakluk kepada pengaruh yang tidak wajar dalam menandatangani dan membuat wasiat; dan (3) sama ada plaintiff berhak mendapat relif pengisytiharan yang dipohon dalam tindakan ini.

Diputuskan, membenarkan permohonan:

- (1) Defendan telah memainkan peranan penting dalam penyediaan dan pelaksanaan wasiat 2019. Keadaan yang mencurigakan wujud disebabkan oleh fakta bahawa defendan telah menyediakan wasiat 2019 dan merupakan benefisiari sejumlah besar harta pewasiat di bawah wasiat tersebut. Seterusnya, defendan tidak memplid kewujudan wasiat 2017 dan wasiat 2018 dalam pembelaannya. Dia hanya memaklumkan plaintiff tentang kewujudan wasiat 2018 dalam jawapannya kepada permohonan plaintiff untuk butiran-butiran lanjut dan lain. Dan dia hanya menyebut kewujudan wasiat 2017 semasa perbicaraan. Defendan tidak mengemukakan sebarang keterangan untuk menghilangkan atau menghapuskan keadaan yang mencurigakan yang menyelubungi penyediaan dan pelaksanaan wasiat 2019. Adalah mustahil untuk mahkamah menentukan keterangan defendan yang mana tentang cara dia menyediakan wasiat 2019 adalah benar kerana dia tidak mengemukakan wasiat 2018 di mahkamah atau dokumen yang dia mendakwa pewasiat telah menulis arahnya untuk meningkatkan peratusan saham dalam syarikat yang dia wariskan kepadanya dalam wasiat 2019. Sehingga dan melainkan mahkamah berpuas hati dari segi kehakiman bahawa keterangan yang dikemukakan oleh defendan telah menghapuskan keadaan yang mencurigakan, ia tidak sepatutnya membenarkan wasiat 2019 diprobetkan. Oleh kerana defendan gagal mengemukakan sebarang keterangan untuk menghilangkan atau menghapuskan keadaan yang mencurigakan, defendan telah gagal untuk melepaskan beban pembuktiannya bahawa wasiat 2019 adalah wasiat terakhir pewasiat (lihat perenggan 97, 99, 102–103 & 105–107).
- (2) Oleh kerana defendan telah gagal untuk menghilangkan atau menghapuskan keadaan yang mencurigakan yang menyelubungi penyediaan dan pelaksanaan wasiat 2019, beban pembuktian tidak beralih kepada plaintiff untuk membuktikan bahawa pewasiat tertakluk

- A kepada pengaruh yang tidak wajar dalam membuat dan menandatangani wasiat 2019. Oleh itu, mahkamah tidak perlu membuat keputusan sama ada pewasiat tertakluk kepada pengaruh yang tidak wajar semasa penyediaan dan pelaksanaan wasiat 2019 (lihat perenggan 109–110).
- B (3) Disebabkan kegagalan defendan untuk menghilangkan atau menghapuskan keadaan yang mencurigakan yang menyelubungi penyediaan dan pelaksanaan wasiat 2019 dengan memuaskan hati nurani kehakiman mahkamah, defendan gagal membuktikan bahawa wasiat 2019 sememangnya wasiat terakhir pewasiat dan ia mewakili kehendaknya. Sehubungan itu, adalah tidak selamat untuk mahkamah membuat keputusan bahawa wasiat 2019 adalah wasiat terakhir pewasiat. Wasiat 2019 adalah batal dan tidak sah dan tidak berkuat kuasa, dan oleh itu, tidak boleh diprobetkan (lihat perenggan 111–112).]
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D Cases referred to

- Barry v Butlin* (1838) 2 Moo PC 480 (refd)
- Chenna Gounder Kandasamy v Angamah Sunappan* [2017] 10 MLJ 387; [2016] 7 CLJ 914; [2016] AMEJ 1276, HC (refd)
- Cleare and Forster v Cleare* (1868) LR 1 P & D 655 (refd)
- E *Cushway & Anr v Harris* [2012] EWHC 2273 (Ch); [2012] 5 WLUK 468, Ch D (refd)
- Fuller v Strum* [2001] EWCA Civ 1879; [2002] 1 WLR 1097, CA (refd)
- Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors* [2005] 2 MLJ 1; [2004] 4 CLJ 309; [2004] 6 AMR 781, FC (refd)
- F *H Venkatachala Iyengar v BN Thimmajamma & others* (1958) Ind Law SC 127; (1959) AIR SC 443; (1959) SCR 426; (1959) Suppl SCR 426, SC (refd)
- Karn Woon Lin & Anor v Cheah Chor Bok* [2010] 5 MLJ 834; [2010] 1 LNS 483; [2010] AMEJ 0107, HC (refd)
- G *Thiang Kai Goh v Yee Bee Eng & Ors* [2005] 1 MLJ 431; [2005] 1 AMR 389; [2004] 1 LNS 382, HC (refd)

Legislation referred to

- H Evidence Act 1950 s 101
Rules of Court 2012 O 72, O 78 r 38
Succession Act [IN] ss 59, 63
Wills Act 1959 ss 3, 4, 5, 5(2)
- I *Liew Teck Huat (with Ong Kang Nyong) (Suflan TH Liew & Partners) for the plaintiff.*
Joshua Kuan Kai Wen (with Hew Li Sien) (Joshua & Assoc) for the defendant.

Faizah Jamaludin J:

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INTRODUCTION

[1] The plaintiff filed this action challenging the validity of the will dated 29 April 2019 (the ‘2019 will’) executed by her late husband Nantha Kumaran a/l Saravanmuthu (the ‘testator’). She seeks a declaration that the 2019 will is null, void and of no effect and that it be set aside. She also seeks a declaration that the testator had died intestate. The testator was diagnosed with Stage-3 non-Hodgkin’s lymphoma in January 2018. He succumbed to the cancer and passed away on 7 June 2019.

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[2] The defendant is the propounder of the 2019 will. She had filed an ex parte Originating Summons No BA-32NCVC-580–07 of 2019 (‘OS 580’) on 19 July 2023 seeking an order of court for the 2019 will to be probated and a grant of probate issued. The plaintiff had filed a caveat against the propounding of the will. The High Court in OS 580 directed under O 78 r 38 of the Rules of Court 2012 that the matter proceeds as a contentious probate action begun by writ under O 72 of the Rules of Court 2012.

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[3] The plaintiff challenged the validity of the 2019 will on the grounds that the testator lacked testamentary capacity and suspicious circumstances surrounding the preparation and execution of the 2019 will. She also alleged that the defendant had exerted undue influence on the testator in the preparation and execution of the 2019 will. She did not, however, challenge the fact that the testator had executed the 2019 and that his signature was attested by two witnesses.

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[4] After full trial, upon considering all the documentary evidence produced and oral testimonies of witnesses, I found that the defendant had failed to dispel or remove the suspicious circumstances surrounding the preparation and execution of the 2019 will. For this reason, this court allowed the plaintiff’s application and declared that the 2019 will to be null, void and of no effect and that it be set aside. I also declared that the testator had died intestate. The full reasons for my decision are set out in this judgment.

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THE LAW

[5] Wills made by non-Muslim persons in Peninsular Malaysia are governed by the Wills Act 1959 (Act 346) (the ‘Wills Act’). The testator was a non-Muslim and made the 2019 will in Selangor.

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[6] Pursuant to ss 3 and 4 of the Wills Act, except as provided under the Act, every person of sound mind, not being a minor, may devise, bequeath or

- A dispose of his property by his will. Sections 3 and 4 of the Wills Act read:
- 3 Property Disposal by will
- B Except as hereinafter provided, every person of sound mind may devise, bequeath or dispose of by his will, executed in manner hereinafter required, all property which he owns or to which he is entitled either at law or in equity at the time of his death notwithstanding that he may have become entitled to the same subsequently to the execution of the will.
- 4 Will of infant invalid
- C No will made by any person under the age of majority shall be valid.
- [7] Section 5 of the Wills Act requires the will to be in writing and for the testator to execute the will in the presence of two or more witnesses in accordance with s 5(2) of the Act.
- D [8] Where there is a challenge on a will, a court must determine whether the impugned will was the last will and testament of the testator. In doing so, the court's 'judicial conscience' must be fully satisfied that the impugned will was the testator's last will and testament: *Barry v Butlin* (1838) 2 Moo PC 480;
- E *Fuller v Strum* [2001] EWCA Civ 1879; [2002] 1 WLR 1097; *Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors* [2005] 2 MLJ 1; [2004] 4 CLJ 309; [2004] 6 AMR 781 (FC).
- F [9] Where there are circumstances in the preparation and execution of a will such as to arouse the suspicion the court, the propounder of the will must prove affirmatively the testator's knowledge and approval so as to satisfy the court that the will represents the wishes of the testator. In *Fuller v Strum* [2001] EWCA Civ 1879; [2002] 1 WLR 1097, the English Court of Appeal held:
- G [33] ... In the ordinary probate case knowledge and approval are established by the propounder of the will proving the testamentary capacity of the deceased and the due execution of the will, from which the court will infer that knowledge and approval. But *in a case where the circumstances are such as to arouse the suspicion of the court the propounder must prove affirmatively that knowledge and approval so as to satisfy the court that the will represents the wishes of the deceased*. All the relevant circumstances will be scrutinised by the court which will be 'vigilant and jealous' in examining the evidence in support of the will: *Barry v Butlin* (1838) 2 Moo PC 480 per Parke B. (Emphasis added.)
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- I *Burden of proof*

[10] The primary difference between proving a will and any other document in court is that the maker of the will ie, the testator, is dead. He cannot be called to court to testify that he is the maker of the will and that it represents his wishes. A

[11] Hence, the law places the burden of proof on the propounder of the will — the party seeking to probate the will — to satisfy the ‘conscience of the court’ that the instrument so propounded is the last will of a free and capable testator: *Cleare and Forster v Cleare* (1868) LR 1 P & D 655. B

[12] This legal principle is known as the doctrine of ‘the righteousness of the transaction’. It has been applied by courts in England and common law countries, including India, Malaysia and Singapore. Pursuant to the principle, where there is a challenge on a will, it is the propounder of the will that has the *onus probandi* ie, the burden of proving that there was due execution of the will by the testator and the testator had the testamentary capacity in making the will. The propounder also has the burden of proof to dispel any suspicious circumstances surrounding the making of the will. This principle was enunciated by Baron Parke in *Barry v Butlin* (1838) 2 Moo PC 480: C D

These rules are two; the first that the *onus probandi* lies in every case upon the party propounding a will; and he must satisfy the conscience of the court that the instrument so propounded is the last will of a free and capable testator. E

The second is, that if a party writes or prepares a will, under which he takes a benefit, that is a circumstance that ought generally to excite the suspicion of the court, and calls upon it to be vigilant and jealous in examining the evidence in support of the instrument, in favour of which it ought not to pronounce unless the suspicion is removed, and it is judicially satisfied that the paper propounded does express the true will of the deceased. F

[13] It was approved by the Federal Court in *Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors* [2005] 2 MLJ 1; [2004] 4 CLJ 309; [2004] 6 AMR 781. Steve Shim CJ (Sabah and Sarawak) held: G

As regards the burden of proof, the Court of Appeal quite rightly stated the settled law ie, that *where the validity of a will was challenged, the burden of proving testamentary capacity and due execution lay on the propounder of the will as well as dispelling any suspicious circumstances surrounding the making of the will; that the onus of establishing any extraneous vitiating element such as undue influence, fraud or forgery lay with those who challenged the will*. In this connection, we find the approach taken by the High Court of Australia in *William Henry Bailey & Ors v Charles Lindsay Bailey & Ors* [1924] 34 CLR 558 to be instructive (Emphasis added.) H I

[14] In *Thiang Kai Goh v Yee Bee Eng & Ors* [2005] 1 MLJ 431; [2005] 1 AMR 389; [2004] 1 LNS 382, Suriyadi J (as he then was) explained that the burden of proof lies with the propounder of the will:

- A [9] *It is trite law that the onus of proof lies upon the person or applicant who wishes to propound a will, and in the process produce that document before the proper authority en route to establishing its legality (Udham Singh v Indar Kaur [1971] 2 MLJ 263). That person or applicant must satisfy the conscience of the court that the instrument so propounded is the last will of a free and capable testator (see Cleare and Forster v Cleare (1869) 1 P&D 655).* As the proceeding moves on, the evidential burden may shift from one party to the other. Theobald in *Wills* at p 31 had occasion to author:
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- C The legal (or persuasive) burden of proof always lies upon the person propounding a will to prove that the testator had testamentary capacity at the relevant time. The evidential burden of proof may shift from one party to one party in the course of the case. (Emphasis added.)

- D [15] In *H Venkatachala Iyengar v BN Thimmajamma & others* (1958) Ind Law SC 127; (1959) AIR SC 443; (1959) SCR 426; (1959) Suppl SCR 426, the Indian Supreme Court held the question for courts in deciding whether the will set up by propounder is proved to be the last will of the testator has to be decided in light of ss 59 and 63 of the Indian Succession Act. Gajendragadkar J said:

- E Thus the question as to whether the will set up by the propounder is proved to be the last will of the testator has to be decided in the light of these provisions (ss 59 and 63 of the Indian Succession Act). *Has the testator signed the will? Did he understand the nature and effect of the dispositions in the will? Did he put his signature to the will knowing what it contained? Stated broadly it is the decision of these questions which determines the nature of the finding on the question of the proof of wills.* (Emphasis added.)
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- G [16] Section 59 of the Indian Succession Act states ‘every person of sound mind not being a minor may dispose of his property by will’. The provision in s 59 of the Indian Succession Act is in pari materia with ss 3 and 4 of our Wills Act. Similar to the requirement under s 5 of the Wills Act, s 63 of the Indian Succession Act stipulates that the testator shall sign or affix his mark to the will and the will has to be attested by two or more witnesses.

- H *Suspicious circumstances*

- [17] As stated by Baron Parke in his oft-quoted judgment in *Barry v Butlin*, ‘the rules are two’.

- I [18] The second rule is that where a person writes or prepares a will under which he or she takes a benefit, it is a circumstance that ought generally to excite the suspicion of the court and calls upon the court to be ‘vigilant and jealous’ in examining the evidence in support of the will. The court ought not to pronounce in favour of the will unless the suspicion is removed, and the

conscience of the court is satisfied that the will to be propounded does express the last true will and testament of the testator.

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[19] The authors of *Sarkar on Evidence* (18th Ed, Reprint 2014) (Vol 2) at p 1982 explained the legal principle as follows:

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Wills — The law has been thus stated in two well-known cases: These rules are two; first, that the *onus probandi* lies in every case upon the party propounding a will and he must satisfy the conscience of the court that the instrument so propounded is that last will of a free and capable testator. The second is, that if a party writes or prepares a will, under which he takes a benefit, that is a circumstance that ought generally to excite suspicion of the court and call upon it to be vigilant and jealous in examining the evidence in support of the instrument, in favour of which it ought not to pronounce unless the suspicion is removed, and it is judicially satisfied that the paper propounded does express the true will of the deceased. (*Barry v Butlin*, 1938, 3 Moo PC 480, 482; 46 RR 123 (relied on and explained in *Harmes v Hinkson*, A 1946 PC 156; 50 CWN 895) and *Tyrrel v Painton*, 1894 PD 151; 10 LT 453. See *Suryanarayana v Suramma*, A 1947 PC 169; *Bai Gangabai v Bhagwan*, 29 B 530 PC; 9 CWN 769; *Gomtibai v Kanchhedilal*, A 1949 PC 272).

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[20] In *Fuller v Strum*, the English Court of Appeal held that a person who had been instrumental in preparing a will under which he was also a beneficiary must prove affirmatively that the testator knew and approved the contents of the will.

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[21] In *H Venkatachala Iyengar v BN Thimmajamma & others*, the Indian Supreme Court reiterated that courts shall treat as suspicious circumstances attending the execution of the will where:

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- (a) the propounder of the will takes a prominent part in the execution of the will, and
- (b) receives substantial benefit under the will.

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[22] It held the propounder of the will must remove the suspicions by clear and satisfactory evidence. Gajendragadkar J said:

Propounders themselves take a prominent part in the execution of the wills which confer on them substantial benefits. *If it is shown that the propounder has taken a prominent part in the execution of the will and has received substantial benefit under it, that itself is generally treated as a suspicious circumstance attending the execution of the will and the propounder is required to remove the said suspicion by clear and satisfactory evidence.* (Emphasis added.)

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[23] Until and unless the conscience of court is satisfied that the suspicious circumstances has been removed by the evidence presented by the propounder, the court ought not to propound the will: *Barry v Butlin*. As held by the

A Gajendragadkar J, in *H Venkatachala Iyengar v BN Thimmajamma & Others*:

... It is in connection with wills that present such suspicious circumstances that decisions of English courts often mention the test of the satisfaction of judicial conscience. ... The test merely emphasises that, in determining the question as to whether an instrument produced before the court is the last will of the testator, the court is deciding a solemn question and it must be fully satisfied that it had been validly executed by the testator who is no longer alive.

Extraneous vitiating factors

C [24] There is a third rule, in addition to the two stated by Baron Parke in *Barry v Butlin*. But it only comes into play after the first two rules have been met.

D [25] The third rule is that where the challenger of a will alleges the existence of extraneous factors that would vitiate the will, such as undue influence, fraud or forgery, the burden of proof shifts to the challenger of the will to prove these alleged extraneous vitiating factors after the propounder of the will had:

E (i) discharged his burden of proof of the due execution of the will and the testamentary capacity of the testator; and (ii) dispelled or removed any suspicious circumstances in the preparation and execution of the will.

F [26] Mohd Nazlan Ghazali JC (as he then was) in *Chenna Gounder Kandasamy v Angamah Sunappan* [2017] 10 MLJ 387; [2016] 7 CLJ 914; [2016] AMEJ 1276, said the following as regards this principle:

G [9] Whilst it is a general common law principle of universal application that a plaintiff in a civil proceedings must prove his case on a balance of probabilities, in relation to the law of wills and testamentary disposition, it is equally well established that when a person challenges a will, ... *it is the person who proposes the will or otherwise known as the propounder of the will, ... who bears the onus probandi or the burden of proof to show that there was due execution and testamentary capacity in respect of the first will and the second will, as the case may be, as well as to dispel any suspicious circumstances surrounding the making of the same. Only after this is established by the said pertinent party in adducing relevant and admissible evidence to the satisfaction of the court, would the plaintiff then be required to prove vitiating aspects of extraneous nature such as undue influence, fraud and forgery of the second will.* The same rule governs the challenge of the first will by the defendant in her counterclaim. (Emphasis added.)

I THE ANALYSIS

[27] Unlike in other types of actions, courts in probate actions have both a supervisory and an investigative role: *Cushway & Anr v Harris* [2012] EWHC 2273 (Ch); [2012] 5 WLUK 468. It is required to be 'vigilant and jealous' in

examining the evidence in support of the will: *Barry v Butlin*.

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[28] Thus, in order to satisfy its judicial conscience whether or not the 2019 will is the last will and testament of the testator, this court must carefully investigate and consider the evidence and the circumstances surrounding the preparation and execution of the 2019 will.

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[29] In this instant case, there is no necessity for the defendant to prove that that the testator had duly executed the 2019 will as the plaintiff did not challenge the fact that the testator had executed the will and that his signature was attested by two witnesses. It is an undisputed fact that the 2019 will was executed on 29 April 2019 by the testator and that DW3 and DW4 had witnessed the testator's signature.

C

[30] She must, however, prove to the satisfaction of this court that the testator had the testamentary capacity to make the 2019 will, and in doing so she must, by adducing clear and cogent evidence, dispel any suspicious circumstances in the making of the 2019 will.

D

[31] Once the defendant has proven to the satisfaction of the conscience of the court that the testator had the testamentary capacity to make the 2019 will and dispelled any suspicious circumstances surrounding the making of the will, the burden of proof shifts to the plaintiff to prove her allegation that the defendant had unduly influenced the testator in the making of the 2019 will.

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[32] Curiously, notwithstanding these long established principles of probate law, learned counsel for the defendant had chosen to ignore them altogether in his submissions. The law is settled that only after the defendant as the propounder of the 2019 will had discharged her burden of proof, will the burden of proof move to the plaintiff as the challenger of the 2019 will to be prove her allegation that the defendant had unduly influenced the testator.

G

[33] In fact, this legal principle can be seen in the case of *Karn Woon Lin & Anor v Cheah Chor Bok* [2010] 5 MLJ 834; [2010] 1 LNS 483; [2010] AMEJ 0107, cited by the defendant's counsel in support of his submissions, where Balia Yusof J (as he then was) said:

H

[3] It is settled law that when the validity of a will is challenged, the burden of proving testamentary capacity and due execution of the same lies on the propounder of the will, as does the burden of dispelling any suspicious circumstances that may surround the making of the will. However, the onus of establishing any extraneous vitiating element such as undue influence, fraud or forgery lies on those who challenge the will (see *Eu Boon Yeap & Ors v Ewe Kean Hoe* [2008] 2 MLJ 868; [2007] 6 CLJ 791, *Dr Shanmuganathan* [2010] 5 MLJ 834; *Periasamy s/o Sithambaram Pillai* [1997] 3 MLJ 61, *Lee Ing Chin @ Lee Teck*

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A *Seng & Ors v Gan Yook Chin & Anor* [2003] 2 MLJ 97; [2003] 2 CLJ 19).

[34] However, the defendant's counsel chose to bring this court's attention only to the second sentence of the above-quoted para 3 of the judgment and to state in para 14 of his submissions that the plaintiff has the burden of proof that the testator signed the will with undue influence and/or duress. He also cited s 101 of the Evidence Act 1950 to support his contention that the burden of proof is for the plaintiff to prove the alleged undue influence, without stating that this burden of proof shifts to the plaintiff only after the defendant has discharged her burden of proof.

[35] I agree that the plaintiff, as the challenger of the will, must prove her allegation that the testator was subject to undue influence in the making of the 2019 will. However, this burden of proof only shifts to the plaintiff after the defendant, who is the propounder of the 2019 will, had discharged her burden of proof that the testator had the testamentary capacity to make the will and she had dispelled the suspicious circumstances in the making of the 2019 will.

MATERIAL FACTS

E The old gentleman died; his will was read, and like almost every other will, gave as much disappointment as pleasure.

Sense and Sensibility, Jane Austen

F [36] Unlike old man Dashwood's will in *Sense and Sensibility*, and as is the norm, the 2019 will was not read out to the testator's beneficiaries after his death.

G [37] The plaintiff, who is the other beneficiary under the 2019 will, only found out about the will when, after the testator's funeral, the defendant came to the plaintiff's house on 25 June 2019 and showed her the 2019 will together with two letters dated 29 April 2019.

H [38] The defendant on the other hand, knew of the will and its contents prior to the testator's death as she was the one who had typed and prepared the will. She is also the executor and trustee of the 2019 will.

I [39] The defendant was bequeathed by the testator a substantial amount of his property and the residue of his estate. She is a trained will writer and had typed and prepared the 2019 will herself. In preparing the will, the defendant did not arrange for independent legal advice for the testator.

[40] It is an agreed fact that when the defendant showed the 2019 will to the plaintiff, the defendant had already instructed her solicitors, Messrs Joshua

& Associates, to file an application in court to probate the said will. The court papers show that the defendant, as the executor of the testator's estate, had signed the *Sumpah Pentadbiran* before a commissioner of oaths on 24 June 2019 — a day before she showed the 2019 will to the plaintiff.

A

[41] The plaintiff is the testator's lawful widow. At the time of his death, they had been married for approximately 36 years. They were orphans and grew up together at an orphanage in Puchong run by the Pure Life Society. There are no children in the marriage. They first met when the plaintiff was four years old and the testator was nine years old.

B

C

[42] After completing his Form 5 education, the testator commenced employment in MARDI in 1972 until his optional retirement in 1983. He then joined one Chong See Foo in a company named Asia Fertiliser Manufacturer Sdn Bhd ('Asia Fertiliser'). The testator subsequently became a shareholder of Asia Fertiliser with Chong. He acquired Chong's shares and continued to operate and manage the business and affairs of Asia Fertiliser when Chong left the company in 2010. In the same year, the testator also incorporated another company, Advanced Fertilizer Manufacturer Sdn Bhd ('Advanced Fertilizer'). He was the majority shareholder and a director of Advanced Fertilizer.

D

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[43] The defendant is a stranger to the family. She is not related to either the testator or the plaintiff. She was a freelance accounts clerk in the Banting area. In 2008, the defendant did some accounts work for Asia Fertiliser on an ad-hoc basis. When the testator incorporated Advanced Fertilizer in 2010, the defendant joined the company as a full-time staff. Within five years of joining Advanced Fertilizer, the defendant climbed up the ranks of the company from accounts officer to director. In March 2015, the defendant was appointed as one of the directors of Advanced Fertilizer.

F

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[44] Approximately a month before the testator's death, the defendant was appointed a director of Asia Fertiliser on 6 May 2019. And just before his death, the testator transferred 20,000 of his shares in Asia Fertiliser to the defendant and sold her 1,250,000 shares of his shares in Advanced Fertilizer.

H

[45] The testator bequeathed the defendant in 2019 will:

- (a) his share of the land and the factory building located at PT1179, HS(M) 11308, Mukim Pekan Teluk, Daerah Kuala Langat, Selangor;
- (b) 1,500,000 shares in Advanced Fertilizer;
- (c) 60% of his monies standing to the credit of his accounts, including fixed deposit accounts, in RHB Bank Bhd and Public Bank Bhd; and

I

- A (d) the residue of his estate, which consisted of jewellery and religious books.

B [46] Advanced Fertilizer operates out of three buildings — Factory A, Factory B and Factory C. Factory A and Factory C are owned by the company and Factory B is owned by the testator and the plaintiff. Factory B is located on the land bequeathed to the defendant under the 2019 will.

C [47] With the gift of the testator's shares in Advanced Fertilizer in the 2019 will, the defendant becomes the majority shareholder of the company, where the shareholding of the company shall be as below if the 2019 will is propounded and the grant of probate issued:

Party	Number of Ordinary Shares	Percentage of Shareholding
Plaintiff	2,250,000 shares	45%
D Defendant	2,750,000 shares	55%

The 2019 will

- E [48] The 2019 will is in the following form:
- F THE LAST WILL AND TESTAMENT OF NANTHA KUMARAN A/L SARAVANAMUTHU
- I, NANTHA KUMARAN A/L SARAVANAMUTHU NRIC No 530912-05-5281 Born on 12-Sep-1953 of No 14B06, Ehsan Ria, Jalan Bukit 11/2, 46200 Petaling Jaya, Selangor Darul Ehsan, Malaysia of full age and sound mind hereby declare this to be my last will and Testament and bequeath as follows:
1. I revoke all wills written by me prior to the date of this will.
 2. I appoint as my Executor and Trustee TEOH YING TIN NRIC No 761116-10-5370 of No 34, Jalan Delima 7, Taman Emas, 42700 Banting, Selangor Darul Ehsan.
 3. I give my share of land with buildings located at PT1179, HS(M) 11308, Mukim Pekan Teluk, Daerah Kuala Langat, Selangor together with all its fittings and fixtures to TEOH YING TIN NRIC No 761116-10-5370.
 4. I give my shares in ADVANCED FERTILIZER MANUFACTURER SDN BHD (917252-W) to my wife SAVATERY A/P JAYARAMAN NRIC No 580112-10-5944 totaling 1,250,000.00 and to TEOH YING TIN NRIC No 761116-10-5370 totaling 1,500,000.00 Shares.
 5. I give my shares in ASIA FERTILISER MANUFACTURER SDN BHD (175935-X) to SAVATERY A/P JAYARAMAN NRIC No 580112-10-5944.
 6. I give my share of condominium located in Petaling Jaya Ehsan Ria Condominium Parcel No 2103 Tower A with the Accessory Parcel No CP 63 erected on the land held HS(D) 22816 Lot 265 District of Petaling

- Jaya, Selangor Darul Ehsan together with all its fittings and fixtures to my wife SAVATERY A/P JAYARAMAN NRIC No 580112-10-5944. **A**
7. I give my share of condominium located in Petaling Jaya Ehsan Ria Condominium Parcel No 1406 together with the Accessory Parcel (car park) bearing No 69 erected on the land held HS(D) 22816 Lot 265 District of Petaling Jaya, Selangor Darul Ehsan together with all its fittings and fixtures to my wife SAVATERY A/P JAYARAMAN NRIC No 580112-10-5944. **B**
8. I give my share of condominium located at Apartment Binga Mawar, Genting erected on the land held No MWD18B, Kawasan Taman Gohtong Jaya, Genting, Negeri Pahang together with all its fittings and fixtures to my wife SAVATERY A/P JAYARAMAN NRIC No 580112-10-5944. **C**
9. I give monies standing to my credit in my RHB BANK BERHAD Current account (Account No 2-12415-000-29249) and all the Fixed Deposit Accounts to my wife SAVATERY A/P JAYARAMAN NRIC No 580112-10-5944 (40%) and to TEOH YING TIN NRIC No 761116-10-5370 (60%) in that proportion. **D**
10. I give monies standing to my credit in my PUBLIC BANK BERHAD Saving account (Account No 6398-4421-18) and all the Fixed Deposit Accounts (Account No 1337-692628) to my wife SAVATERY A/P JAYARAMAN NRIC No 580112-10-5944 (40%) and to TEOH YING TIN NRIC No 761116-10-5370 (60%) in that proportion. **E**
11. I give monies standing to my credit in my STANDARD CHARTERED BANK IN SINGAPORE account to my wife SAVATERY A/P JAYARAMAN NRIC No 580112-10-5944. **F**
12. I give all vehicles I own at the date of my death to my wife SAVATERY A/P JAYARAMAN NRIC No 580112-10-5944.
13. I give my residue estate to TEOH YING TIN NRIC No 761116-10-5370. **G**

[49] The two letters dated 29 April 2019, purportedly written by the testator to the defendant ('the first letter') and the plaintiff ('the second letter') given by the defendant to the plaintiff together with the 2019 will read as follows: **H**

(a) (a) the first letter:

Dear my dearest Ms Teoh Ying Rin

RE: THE LAST WILL AND TESTAMENT OF NANTHA KUMARAN
A/L SARAVANAMUTHU (NRIC NO 530912-05-5281) **I**

With regards to the above, I have today made a declaration to make you as a beneficiary and trustee of my will. I am certain that I am placing these in good hands. I have deep respect for your good qualities, sincere hard work and intelligence. This is the reward for your diligence and loyalty to me.

- A** Thanking you.
 Written in the office,
 Yours sincerely,
- B** (signed)
 Nantha Kumaran A/L Saravanamuthu.
- (b) (b) the second letter:
- C** Dear my dearest Savatery,
 RE: THE LAST WILL AND TESTAMENT OF NANTHA KUMARAN
 A/L SARAVANAMUTHU (NRIC No 530912-05-5281)
 With regards to the above, I have made a will as regards my properties and
 monies.
- D** I want to thank you for your dedication and love shown to me.
 I have placed all my properties to Ms Teoh Ying Rin (NRIC No
 761116-10-5370). I have full faith in her continuing the operation of the
 company.
- E** As regards to your shares in Advanced Fertilizer Manufacturer Sdn Bhd and
 Asia Fertilizer Manufacturer Sdn Bhd, please cooperate with her to carry on
 the business as I have done.
 This will benefit all including your good self.
- F** Thanking you.
 Written in the office,
 Yours sincerely,
- G** (signed)
 Nantha Kumaran A/L Saravanamuthu.

- H** [50] The 2019 will, as well as both letters, were typed and prepared by the
 defendant. They were signed by the testator on 29 April 2019. The testator's
 signature on the 2019 will was witnessed by Henry John Rayappan ('DW3')
 and Nor Hidayu bt Mohid ('DW4').

The testator's medical condition from January-April 2019

- I** [51] As the time of the making and the execution of the 2019 will, the
 testator was suffering the end stages of non-Hodgkin's lymphoma, a type of
 blood cancer. He was admitted into hospital in May 2019, a few days after
 signing the 2019 will, and remained there until his passing on 7 June 2019.

[52] Dato' Dr Vijaya Sangkar Jaganathan ('PW1') of Pantai Hospital Kuala Lumpur was the consultant haematologist who had treated the testator from January 2018 until his death.

A

[53] PW1 told the court that the testator required cytotoxic chemotherapy for his cancer and that he had started chemotherapy in January 2018. Despite an initially favourable response, the testator suffered a relapse in January 2019. After undergoing transplant-type procedures that yielded no favourable responses and failed attempts to manipulate his T-cells for possible CAR-T therapy, the testator's condition deteriorated progressively.

B

C

[54] A PET scan report dated 22 April 2019 stated that the scan found relapsed follicular lymphoma with a new site of disease involvement, indicating progressive disease. PW1 testified that the PET scan showed that the testator was not responding to the many lines of chemotherapy.

D

[55] During his examination in chief, PW1 confirmed that he had told the testator, in the presence of his wife, the plaintiff, the bad news on 23 April 2019. The excerpt from PW1's testimony is reproduced below:

Plaintiff's counsel: Dr, thank you very much for that illuminating lecture. So, I just heard from you that it was on the 23rd of April that you revealed what basically we can say, the bad news to him.

E

PW1: Yes.

Plaintiff's counsel: He was terminal, he was incurable.

F

PW1: Yes. Before we do any form of family counselling, it is routine practice that we get the patient and the next of kin or anyone who wants to hear, so I insisted Mr Nantha to bring Mrs Nantha along. And because this is not be a good news, I can't talk to them in my routine visit clinic, so I saw them in the evening, must be around 03.30PM, 04.00PM in my clinic and we had a long chat. And I told him this news that the PET scan was not good because it was done a before and we area coming to end of the road and we will try to see whether we can do some form of T-cell therapy.

G

[56] In his report dated 1 July 2019, PW1 summarised the medical procedures and treatment that were administered on the testator, including a flowchart from the first diagnosis in January 2018 until the hospital decided to end his treatment. PW1 told the court that after informing the testator of his diagnosis, the hospital tried to attain his T-Cells to culture in the lab but without success.

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[57] PW1 showed this court that in the records of medical procedures and treatments listed in his report, the testator had a bone marrow transplant in October 2018 — stated in Bundle B1/p 24 as 'Autologous Peripheral Blood Stem Cell Transplantation' conducted on 29 October 2018. PW1 explained

- A that generally, with a transplant, the patient's life expectancy can be extended by 10 to 15 years. However, patients 'who relapse [the] disease within six months don't do as well as people who relapse within a year'. In this case, the testator had relapsed within three months of the transplant — in January 2019.
- B PW1 said that the testator at that time already knew that he was not well and had to undergo salvage treatment — which PW1 said was the beginning of the testator's agony.

- C [58] PW1 said that the testator was emotionally down from January 2019 onwards. The excerpt of PW1's testimony on this subject is reproduced below:

- D PW1: ... He relapsed within three months, as you can see dated January 2019. So, he already knew at that time he was not well and therefore, we going to salvage treatment. So, that was the beginning of the agony. He was emotionally down throughout the time from January onwards. And every admission, he is just very disappointed because he came with lots of expectations, but we always say that expectations has got limitations. And in April, when we told him that we have come to the end of the road, at least to the availability that's available to us, he was distraught and he was emotionally withdrawn, yes.

- E [59] When asked by counsel for the plaintiff, as to how was the testator's physical condition from March–April 2019 onwards, PW1 replied:

- F PW1: No, I can't confirm because what he had was treatment that's not walk in the path. These were all intensive chemotherapy. So, one would see as much as it drops, his blood counts, and puts him at risk of infection, one would know that this patient will physically inactive, very lethargic, tired and the effort tolerance is reduced. And you can see, I could see him losing weight, losing confidence, that he is becoming more sicker.

- G [60] The drugs administered to the testator from January 2018 to his death on 7 September 2019 are listed in PW1's report. When asked about the side effects suffered by the testator as a result of the medication PW1 said:

- H Plaintiff's counsel: Understand yes. So, Dr, these were the very extensive array of medication that he has been receiving in the course of his treatment. Can you tell the court whether or not there would be side effect from any of this medication?

- H PW1: Definitely, almost certainly. Almost 100% of patients will have side effects.

- H Plaintiff's counsel: What sort of side effects?

- H PW1: So, in which phase of the treatment?

- I Plaintiff's counsel: Say from January 2019 onwards?

- I PW1: January 2019 is when the late Mr Nanthan had relapse lymphoma. So, if I were to look at, for ease sake, page 36, one would think that in January 2019, we did some routine blood test. He had biopsy of node. And in 11/01/2019, we started to salvage chemotherapy. He had antibodies and high dose chemotherapy. So, the common

side effects will be lethargy, exhaustion, fatigue, lassitude, that would be symptoms. Nausea, vomiting and abdominal discomfort and bone pain. And as far as blood count is concerned, his counts dropped, that means his white cells dropped and that puts him at a higher risk of infection. He required admission for antibiotics and fever along with infection. (Emphasis added.)

A

B

[61] PW1 explained that ‘salvage chemotherapy’ is a terminology used to explain the rescue drug used on the testator starting from January 2019. He said the rescue drug used in the salvage chemotherapy was ‘a new combination of drugs, drugs that he [the testator] had not seen before, we are trying to cheat the disease and using different pathways to treat him’.

C

[62] From the evidence before this court, we know that the testator had executed the 2019 will on 29 April 2019 — six days after PW1 told him and the plaintiff that his cancer had progressed, he was not responding to chemotherapy, that he was terminally ill — with one year or less to live. The medical records also show that in April 2019, the testator had undergone salvage chemotherapy on the 5th and 6th of April. And on the 24 and 29 of April, the doctors attempted to conduct CAR-T cell therapy on him but failed because of ‘pheresis due to very low counts’.

D

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Preparation of the 2019 will

[63] The defendant (‘DW6’) testified that she holds a diploma in accounting from Systematic College, a college in PJ. She does not have any professional qualifications in accounting. She took a course in will writing and was registered as a will writer in 2004.

F

[64] The defendant informed the court that at the will writing course, she was taught that without a will, the deceased’s estate ‘will go to LA’. She also said that she knew from the course that there must be two witnesses and an executor for a will.

G

[65] One of the plaintiff’s complaints pleaded in paras 33(b) and (c) of her statement of claim is that the defendant had failed to obtain independent legal advice for the testator in the preparation of the 2019 will. It is an undisputed fact that the testator did not receive any independent legal advice in the preparation of the 2019 will.

H

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[66] In response to the plaintiff’s complaint that the testator did not receive independent legal advice, the defendant, in para 30.2 of her defence pleaded that as a matter of law, the defendant was not responsible in obtaining third-party legal advice. She pleaded:

- A** 30.2 Merujuk perenggan 33(b), Defendan tidak mempunyai tanggungjawab untuk membuat pengaturan tersebut dan ia tidak diperlukan untuk wasiat terakhir tersebut disempurnakan dan disahkan di sisi undang-undang.
- B** [67] However, under cross-examination, the defendant said that she had asked the testator to get an independent third-party lawyer in the preparation of the 2019 will because of the amount of property he was giving her but he said, ‘don’t need’. Excerpts of her testimony on this issue are reproduced below:
- C** Plaintiff’s counsel: You asked him should we get professional 3rd party professional to do this, the will, he said don’t need?
DW6: Yes.
- ...
- D** Plaintiff’s counsel: Right, so it is, so you thought that it was prudent, better to get a 3rd party legal independent advice, right? You thought that it was important for that to be done because of why, because he was giving away a lot of the assets to you and because he was already suffering from terminal illness, right?
- E** DW6: Not because of the suffering.
Plaintiff’s counsel: Because he was giving away properties to you?
DW6: Yes.
- F** [68] The defendant’s testimony that she had told the testator that it is better for him to obtain third party professional advice and that he said ‘don’t need’ was a bare averment that was neither pleaded in her defence nor stated in her witness statement. It was brought up for the first time during the trial and is unsupported by any evidence.
- G** [69] The defendant testified that she had also prepared and typed the testator’s first will in 2017 (‘2017 will’) and his second will in 2018 (‘2018 will’). She said she had typed both wills in the format she had learnt during her will writing course based on a draft paper that the testator wrote down. The excerpt of the defendant’s testimony on the preparation of the 2017 will and 2018 will is reproduced below:
- H** Plaintiff’s counsel: In 2018, you drafted a will for him? Sorry, you prepared the will for him.
- I** DW6: Yes.
Plaintiff’s counsel: And you said you helped him to type out the will?
DW6: Yes.
Plaintiff’s counsel: You typed it out based on what he wrote to you?

- DW6: No, that means, what his asset, what is the percentage or, he will wrote it down in a draft paper, and then I'm the one who typing lah. A
- Plaintiff's counsel: Sorry, can you repeat what you just said? How was it that 2018 will prepared?
- DW6: Same only, that means he wrote down what his asset — B
- Plaintiff's counsel: So, he wrote it down?
- DW6: Yes.
- Plaintiff's counsel: And he gave you that note? C
- DW6: Yes.
- Plaintiff's counsel: And then you typed based on that note?
- DW6: I followed the format, the previously I become a will writer, I got the format of the will, the same like this, then I changed whatever asset inside. D
- [70] It is pertinent to note that the defendant, in her reply to the plaintiff's application for further and better particulars of the defence, did not mention the existence of the 2017 will. She stated in para 11 of the reply that the testator had executed one previous will in 2018 and that the will was witnessed by Kaman Kamis ('DW1') and Teoh Bee Phew. However, under cross-examination, the defendant said that the testator had also perfected another will in 2017 and that DW1 and Teoh Bee Phew were the witnesses to the 2017 will and not the 2018 will, as she had stated in the reply. The defendant said that the witnesses for the 2018 will were DW1 and DW3 and not DW1 and Teoh Bee Phew, as stated in the reply. E
F
- [71] The defendant's testimony contradicts DW3's, who told this court that he had witnessed the testator's two previous wills prior to witnessing the 2019 will. Thus, DW3 would also have been a witness to both the 2017 will and 2018 will. G
- [72] DW3 said that the testator asked him to witness his signing of the 2019 will on the morning of 29 April 2019 at around 9.00am. He said he was surprised that the testator would make another will since he had made two other wills, and that the testator never told him he would prepare the third will. H
- [73] The plaintiff had issued a notice to produce for the defendant to produce all the testator's previous wills made before the 2019 will. In her reply to the notice to produce, the defendant stated the previous will had been destroyed. She did not state whether it was the 2017 will or the 2018 will that had been destroyed. I

- A** [74] When asked under cross-examination why she never mentioned the testator's 2017 will before and only mentioned it during the trial in the witness box, the defendant replied that she could not remember whether she had told her lawyer about the 2017 will and that she did not have an answer to the question as to why she only mentioned the 2017 will for the first time during the trial. This can be seen from the excerpt of her testimony below:

B Plaintiff's counsel: So, after all this, then I asked you the question, why did you disclose the 2017 will for the first time only now in the witness box, and not mention it previously when you knew that were asking about all previous wills? So, have you got an answer for us?

C DW6: No, actually, I can't remember whether I told my lawyer or not. But now only I saw, here only mentioned the 2018.

Plaintiff's counsel: Yes, of course, we can see that. But so, my question to you is why didn't you also mention 2017?

D DW6: I can't remember whether I mentioned to my lawyer or not.

Plaintiff's counsel: No, no, you cannot now talk about your lawyer. The document is what we see is what we get.

E DW6: Yes.

Plaintiff's counsel: Right? It is not mentioned her. So, I'm just asking you to answer that question to Her Ladyship. Why didn't you mention the 2017? And now you mentioned it for the first time in the witness box.

F DW6: Yes (01:49:54).

Plaintiff's counsel: Do you have an answer?

DW6: No.

Plaintiff's counsel: You don't have an answer for that?

G DW6: Yes.

[75] The defendant said that the testator told her in March 2019 that his cancer was incurable, and his condition was terminal.

H [76] With regards to the preparation of the 2019 will, the defendant, in her answer to Q37 in her witness statement ('WSDW6'), had stated:

A37. I was asked to prepare for the Deceased's will a day before signing, following instructions given by him on how to distribute his assets upon his demise.

I [77] However, contrary to the answer in her witness statement, the defendant told the court during the trial that the 2019 will was prepared based on the 2018 will. The defendant said that she prepared the 2019 will by changing the percentage of company shares given to her by the testator in the

2018 will. She said that the percentage of shares given to her in the 2019 will was higher than that in the 2018 will. When asked by the plaintiff's counsel what the difference between the 2019 and 2017 will was, the defendant replied that the 2018 will was totally different from the 2017 will but she could not remember the changes.

A

[78] The defendant did not plead the existence of either the 2018 will or the 2017 will. Neither did she mention the wills in her witness statement. The existence of the 2018 will was only brought to light in the defendant's reply to the plaintiff's request for further and better particulars. And she only told this court and the plaintiff of the existence of the 2017 will under cross-examination.

B

C

[79] The defendant did not produce either the 2017 will or the 2018 will in court. When asked during cross-examination where the 2017 will and 2018 will are, she said both wills, including all copies of the wills, had been destroyed.

D

[80] When asked about the soft copy of the 2017 will and the 2018 will, the defendant said that no soft copies of both wills were saved — she had overridden the soft copies of both wills when she typed in the changes to the wills.

E

[81] She said that the 2018 will was signed in the office by the testator and witnessed by DW1 and DW3. The defendant said that she was present when the 2018 will was signed and that the testator had covered the will when he signed it. When asked by plaintiff counsel, whether the testator had covered the will because he did not want anyone to see its content, including herself, the defendant replied 'No, I'm the one who prepared what, sure I know the content'.

F

Execution of the 2019 will

G

[82] The requirement for a valid will under the Wills Act is for the will to be in writing and for the testator to execute the will in the presence of two or more witnesses in accordance with s 5(2) of the Act. The Act does not require a will to be executed before a court officer or a lawyer.

H

[83] Nonetheless, on the morning of 29 April 2019 at around 10.00am, the testator, the defendant and the two witnesses, DW3 and DW4, drove to the Telok Datok court with the objective of having the testator to sign the 2019 will before an officer of the court.

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[84] They arrived at the court at approximately 10.30am, where a staff at the court counter told them that the court did not provide witnessing services.

- A [85] They then drove to Banting to go to a law firm that the testator knew. They arrived in Banting at around 11am. However, they were unable to locate the law firm. They then drove to a law firm in Bukit Tinggi, where they went to a law firm, Messrs Dev Pillai & Co. They arrived at the law firm at 12pm. They met a lawyer at the firm and were informed that the law firm does not provide
- B witnessing services for a pre-prepared will. They then drove back to the office and reached the office at 1.00pm.

- C [86] The facts show that after the three-hour drive around Selangor — from Advanced Fertilizer's office in Telok Panglima Garang to Telok Datok, to Banting, to Bukit Tinggi, and back to the office — the testator signed the will in the office before DW3 and DW4 as witnesses in the presence of the defendant.

- D [87] No satisfactory evidence was produced during the trial to show why it was necessary for the terminally ill testator to be subjected to the three-hour car ride only for him to sign the will at the office. The defendant, under cross-examination, confirmed that she knows there is no requirement for a will to be executed before an officer of a court or a lawyer for it to be a valid will.

- E [88] As for the witnesses, DW3 and DW4: they both work in Advanced Fertilizer and report to the defendant.

- F [89] DW3 worked with the testator in MARDI, and he joined Asia Fertiliser in 1994 as a factory manager. He then joined Advanced Fertilizer as a general manager. He was appointed as a director of Advanced Fertilizer in 2015. DW3 said that in 2019, the testator asked him to resign as director of the company, and he resigned as director on 28 February 2019.

- G [90] DW3 said that the testator never told him that he would prepare the 2019 will. He said that the 2019 will was the testator's third will. DW3 said that he had witnessed all three wills — and signed the two previous wills as a witness.

- H [91] DW3 said that he drove the car during their trip to the Telok Datuk court, Banting and Bukit Tinggi. He said during the journey the 2019 will was held by the defendant. DW3 said at the law firm at Bukit Tinggi, they were informed by the lawyer that the law firm does not witness pre-prepared wills but that the firm can draft a will for the testator for a fee. The offer was
- I declined, and the four of them returned to the office, where the testator signed the 2019 will witnessed by DW3 and DW4 in the presence of the defendant.

[92] DW3 testified that the testator's condition had worsened in March 2019 — he was tired very often and had to lie down. DW3 also said that during

March/April 2019, the testator was emotionally distressed and upset that he was not improving. He also said that during that period, the testator often got angry.

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[93] DW4 works as a clerk at Advanced Fertilizer. She reports directly to the defendant. I found DW4 to be a most reluctant witness. During cross-examination, she was extremely hesitant in answering even the simplest of questions posed by the plaintiff's counsel. As the notes of proceedings show, I had to remind her that she had to answer the questions posed by the plaintiff's counsel and not to look at the defendant's lawyer when questions are asked of her. An excerpt of DW4's testimony is reproduced below:

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Plaintiff's counsel: Pn Hidayu, I put it to you that you are unable to or you refused this simple question because you came to court today to deliberately put aside Ms Teoh's name and not get her involved, right? Because she told you —

D

DW4: Saya takut —

Plaintiff's counsel: Because she told you that you must do this. Is that the true position? You understand or not?

DW4: Saya tak berapa faham.

E

Plaintiff's counsel: You see, you refused to, you tak mahu answer soalan tadi itu, right? I tell you the reason for that is because Ms Teoh told you that you must not mention her name or you must not mention her involvement in this case at all. Isn't that the true story.

DW4: Tak ada. Bukan begitu.

F

[94] Both DW3 and DW4 said that they had drafted their witness statements themselves. However, both their witness statements are worded the same. This is indeed curious since both witnesses testified under oath during the trial that they never discussed their witness statements with anyone except for the defendant's lawyer and had drafted the statements themselves. DW4's witness statement was initially in English. Subsequently, near the trial date, a Bahasa Malaysia version was filed in court. DW4's witness statement in Bahasa Malaysia is essentially a translation of the English version filed earlier.

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ISSUES

[95] The agreed issues to be tried are:

- (i) whether there are circumstances attending to the preparation and execution of the will that gave rise to suspicion on the basis of which this court should not allow the will to be probated;
- (ii) whether the testator was subjected to undue influence in signing and making the will; and

I

- A (iii) whether the plaintiff is entitled to the declaratory reliefs sought in this action?

B *Issue (i): Whether there are circumstances attending to the preparation and execution of the will that gave rise to suspicion on the basis of which this court should not allow the will to be probated?*

C [96] One of the circumstances that excite the suspicion of the court is where a person wrote or prepared a will under which he or she took benefit: see *Barry v Butlin*; *H Venkatachala Iyengar v BN Thimmajamma & others*.

D [97] In this instant case, the defendant had played a prominent part in the preparation and execution of the 2019 will. She had typed and prepared the will. She also takes substantial benefit under the will. Under cross-examination, she agreed that the testator had bequeathed her more than half of his assets in value. She also agreed that the value of Advanced Fertilizer's factory and shares bequeathed to her in the 2019 will was around RM20m to RM30m.

E [98] The defendant had also typed and prepared the testator's 2017 will and 2018 will. Both the 2017 will and the 2018 will were not produced in court. She claims that both these wills have been destroyed and no copies of the wills exist.

F [99] Based on the available evidence, as the regards of the first part of issue (i) of whether there exist suspicious circumstances in the making of the 2019 will, this court finds that such suspicious circumstances exist by reason of the fact the defendant had prepared the 2019 will and is a beneficiary of a substantial amount of the testator's property under the will.

G [100] On the second part of issue (i) ie, whether this court should allow the 2019 will to be probated, the answer depends on whether the defendant dispels or removes the suspicious circumstances by presenting clear and cogent evidence and the conscience of this court is satisfied that the 2019 will does express the last will and testament of the testator.

H [101] As discussed above, the defendant's oral testimony during the trial as to how she had prepared the 2019 will differs from the evidence in her witness statement. In her witness statement, she stated in A37 that she was asked to prepare the 2019 will a day before the execution of the will based on instructions given by the testator on how to distribute his assets upon his death. But during trial, she testified that she had prepared the 2019 will by amending the amount of the shares in the company given to her by the testator in the soft copy of the 2018 will. She said the percentage of shares given to her in the 2019 will was higher than that in the 2018 will.

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[102] The defendant did not plead the existence of the 2017 will and the 2018 will in her defence. She only informed the plaintiff of the existence of the 2018 will in her reply to the plaintiff's application for further and better particulars. And she only mentioned the existence of the 2017 will during the trial.

A

[103] The defendant did not produce any evidence to dispel or remove the suspicious circumstances surrounding the preparation and execution of the 2019 will. She had instead produced an expert report on the genuineness of the testator's signature on the 2019 will even though the plaintiff did not challenge the fact that the testator had signed the 2019 will.

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[104] Questions surrounding the circumstances relating to the making of the 2019 will remain unanswered: was the defendant's statement in A37 of her witness statement true, or was her oral testimony in court true? Did the testator also bequeath the defendant in the 2018 will his share of Advanced Fertilizer's land and factory, his shares in the company, 60% of the monies in his bank accounts in RHB Bank and Public Bank, and the residue of his estate? Was the only difference between the 2018 will and the 2019 will the increase in the number of his shares in Advanced Fertiliser that he bequeathed to the defendant in the 2019 will?

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[105] For this reason, I find that it is impossible for this court to determine which of defendant's evidence as to how she prepared the 2019 will is true since she did not produce the 2018 will in court or the paper on which she claims the testator had written his instructions to increase the percentage of shares in the company he was bequeathing to her in the 2019 will.

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[106] The law is settled that any suspicious circumstances in the making of a will must be removed to 'the satisfaction of the judicial conscience' before a court can allow the will to be probated. Accordingly, until and unless this court is judicially satisfied that the evidence presented by the defendant has removed the suspicious circumstances, it ought not to allow the 2019 will to be probated.

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[107] As the defendant failed to produce any evidence to dispel or remove the suspicious circumstances, this court finds that the defendant had failed to discharge her burden of proof that the 2019 will was the last will and testament of the testator.

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Issue (ii): Whether the testator was subjected to undue influence in signing and making the will?

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[108] As discussed above, the burden to prove extraneous vitiating factors in the preparation or execution of the will, such as undue influence,

- A fraud or forgery, is on the challenger of the will. However, the said burden of proof shall only shift to the challenger of the will after the propounder of the will had: (i) discharged his burden of proof that the will was the testator's last will and testament; and (ii) dispelled any suspicious circumstances surrounding the preparation and execution of the will, to the satisfaction of the conscience of the court.
- B

- C [109] In this instant case, as the defendant had failed to dispel or remove the suspicious circumstances surrounding the preparation and execution of the 2019 will, the burden of proof does not shift to the plaintiff to prove that the testator was subject to undue influence in making and signing the 2019 will.

- D [110] It follows, therefore, that this court does not have to make a finding on whether or not the testator was subjected to undue influence during the preparation and execution of the 2019 will.

Issue (iii): Whether the plaintiff is entitled to the declaratory reliefs sought in this action?

- E [111] Because of her failure to dispel or remove the suspicious circumstances surrounding the preparation and execution of the 2019 will to the satisfaction of this court's judicial conscience, the defendant failed to prove that the 2019 will was indeed the testator's last will and testament and that it represents his wishes.
- F

- G [112] Accordingly, it would be unsafe for this court to make a finding that the 2019 will is the last will and testament of the testator. For this reason, this court finds that the 2019 will is null and void and of no effect, and thus, should not be probated.

[113] Therefore, this court gives judgment to the plaintiff and holds that she is entitled to the declaratory reliefs prayed for.

H DECISION

- I [114] Accordingly, for the above reasons, this court hereby declares that the last will and testament of Nantha Kumaran a/l Saravanamuthu (IC No 530912-05-5281) dated 29 April 2019 be set aside and is null, void and of no effect.

[115] Further, it is declared that Nantha Kumaran a/l Saravanamuthu (IC No 530912-05-5281) died intestate.

Application allowed.

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Reported by Nabilah Syahida Abdullah Salleh

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